

ADDENDUM

Westinghouse Bench Decision

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 17-10751-mew

4 - - - - - x

5 In the Matter of:

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7 WESTINGHOUSE ELECTRIC COMPANY LLC, et al.,

8

9 Debtor.

10 - - - - - x

11

12 United States Bankruptcy Court

13 One Bowling Green

14 New York, NY 10004

15

16 July 20, 2018

17 4:01 PM

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21 B E F O R E :

22 HON MICHAEL E. WILES

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: F. FERGUSON

1 HEARING re Decision to be read into the record concerning
2 Landstar's objection to Whitebox's notices of partial
3 transfer of claim.

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25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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3 P R E S E N T T E L E P H O N I C A L L Y :

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5 B R I A N P . M O R G A N

6 C H R I S S T A U B L E

7 C I N D Y D E L A N O

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1 P R O C E E D I N G S

2 THE COURT: All right. Are the parties here on
3 the Whitebox-Landstar dispute?

4 MR. NEWMAN: Yes, Your Honor. This is C.G.
5 Newman from Davis & Gilbert for Landstar.

6 MR. PIERCE: Your Honor, this is Clay Pierce from
7 Drinker Biddle & Reah on behalf of Whitebox.

8 THE COURT: Thank you very much. All right, we
9 are here so that I may dictate my decision into the record.
10 I'm going to direct the Whitebox attorneys as the attorneys
11 for the party who filed the transfer notices to obtain a
12 transcript of what I say and to provide it to the Court in
13 Word format so that we can clean up the inevitable
14 inadvertent misstatements or mis-citations, or misspellings
15 that will occur.

16 In particular, I have noted that after 40 years of
17 legal and judicial practice and 40 years of what to me
18 always seemed like ever-changing Blue Book conventions, I am
19 notoriously inconsistent in the citation formats that I use,
20 so that citations that I read in the record today will have
21 to be cleaned up in the final bench decision. So let me get
22 to the decision.

23 I want to start by commending the parties' counsel
24 on their excellent, and very thoughtful submissions and on
25 the streamlined and professional way in which the exhibits

1 and the testimony were presented. It was a great help as
2 well as a great pleasure to the Court to have experienced
3 advocates present a case in such a high quality manner.

4 Before the Court are disputes that relate to three
5 proofs of claim filed in the Chapter 11 case of Westinghouse
6 Electric Company, et al. The proofs of claim were filed by
7 Landstar Global Logistics, Inc., Landstar Inway, Inc., and
8 Landstar Express America, Inc. For convenience I will refer
9 to those three entities collectively today as Landstar, as
10 for purposes of today's rulings it is not necessary to
11 distinguish among them.

12 On February 6, 2018, notices of the partial
13 transfers of the three claims were filed. Collectively, the
14 notices contemplated a full transfer of each claim but the
15 notices were denominated as partial transfers because there
16 were multiple transferees who were involved with respect to
17 individual claims.

18 The transfer notices are at Docket Numbers 24-27
19 through 24-32. A corrected version of Docket Number 24-27
20 was filed on February 7, 2018 to correct an inadvertent
21 error in the attachments to the notice, and that corrected
22 notice is at Docket Number 24-33. If you hear a pause, I've
23 just taken a drink of water. That's all.

24 The filed transfer notices included attachments
25 that explained the bases for the transfers. The attachments

1 asserted that the Landstar entities had offered to sell the
2 claims and that the offers had been accepted by Seaport
3 Global Holdings, LLC, which was acting on behalf of an
4 entity named Whitebox Advisors, LLC, which, in turn, was
5 acting for affiliated entities named Whitebox Multi-strategy
6 Partners, LP, Whitebox Asymmetric Partners, LP, and Whitebox
7 Multi-strategy Partners, LP. I may have listed one of those
8 entities twice.

9 During the remainder of this opinion I will refer
10 to Seaport Global Holdings, LLC as Seaport. I will also
11 refer to the various Whitebox entities collectively as
12 Whitebox, just as the parties did throughout the trial.
13 Because for today's rulings it is not necessary to
14 distinguish among the various Whitebox entities.

15 Transfers of claims are subject to the terms of
16 Rule 3001 of the Federal Rules of Bankruptcy Procedure. On
17 February 26, 2018, the Court approved a stipulation among
18 the parties that extended the Landstar parties' deadline for
19 the filing of objections to the claim transfers to and
20 including March 15, 2018. Landstar then filed a timely
21 objection to the transfer notices on March 15, 2018. (See
22 Docket Number 28-57.)

23 Section 502 of the Bankruptcy Code gives me
24 jurisdiction over claims against an estate, and the Federal
25 Rules of Bankruptcy Procedure give me power to resolve

1 disputes over claim transfers. The parties agreed, at least
2 with respect to the validity of the transfer notices, that I
3 had jurisdiction and that I could and should render a final
4 decision on the merits of their dispute.

5 However, there have been some changes during the
6 course of these proceedings in the legal theories advanced
7 by the parties, or more particularly, in the legal theories
8 advanced by Whitebox, which resulted in some additional
9 questions at the outset of the trial.

10 As background to those questions I need to set
11 forth a somewhat more detailed procedural history than might
12 otherwise have been needed.

13 Whitebox contended in its February 6th transfer
14 notices that a series of email exchanges gave rise to a
15 "qualified financial contract" under Section 5-701B2i of the
16 New York General Obligations Law. Whitebox argued that the
17 alleged transfer agreement was fully binding and enforceable
18 based on the email exchanges and without regard to whether
19 further documentation was signed.

20 Landstar made a number of arguments in the
21 objection that it filed on March 15, 2018.

22 First, Landstar contended that there had not been
23 an offer and an unequivocal acceptance. It contended that
24 the sale offer identified by Whitebox had not been accepted,
25 but instead that a counteroffer had been made. Landstar

1 further argued that the counteroffer substantially altered
2 the economics of the proposed deal, that it was rejected by
3 Landstar and that no contract was formed.

4 Second, Landstar contended that the parties had
5 made clear in their discussions that no contract of sale
6 could or would be formed until the execution of definitive
7 written agreements, and that absent such written agreements,
8 there was no intent to be found.

9 Third, Landstar argued that material terms of a
10 contract, such as the identities of the actual purchasers
11 and certain economic terms, had never been agreed upon.
12 Landstar, therefore, objected to the transfer notices in
13 their entirety and asked the Court to order Whitebox to
14 withdraw them and to direct the claims agent to recognize
15 Landstar as the holder of the claims.

16 After the filing of the objection, certain
17 discovery disputes arose between the parties and were the
18 subject of a telephone conference with the Court. The Court
19 also directed the parties to make further submissions
20 regarding the relevant legal issues, and the parties did so
21 on May 24, 2018. The Whitebox submission is at Docket
22 Number 32-66 and the Landstar submission is at Docket Number
23 32-63.

24 In its May 24th submission, Whitebox continued to
25 argue that the parties' email exchanges created an

1 enforceable contract that was binding without execution of a
2 written agreement.

3 However, Whitebox also argued in the alternative
4 that the exchanges produced a binding preliminary commitment
5 that obligated the parties to negotiate in good faith as to
6 other open terms. Whitebox described this as a contention
7 that the parties had entered into a so-called Type II
8 agreement, as that term is used in the Second Circuit Court
9 of Appeals decision in *Brown v. Cara*, 420 F.3d 148 (2d
10 Cir.2005).

11 In *Cara*, the Second Circuit describes such a
12 contract as one in which parties enter into a binding
13 agreement as to certain terms and a binding agreement to
14 negotiate in good faith as to other open issues.

15 We often see examples of such contracts in the
16 form of commitment letters to negotiate financing or, as in
17 the *Cara* decision, in the form of a memorandum of
18 understanding in which parties contractually commit that
19 they will work together to accomplish a particular project.

20 The parties appeared before the Court to discuss
21 Landstar's objection to the transfers on May 30, 2018. At
22 that time, counsel for Landstar urged the Court to resolve
23 the matter based on the written materials that had been
24 submitted. Counsel for Whitebox contended that further
25 discovery was needed and that a trial should be held to

1 resolve disputes as to the parties' intent. I ruled that
2 discovery should be completed and that the matter should be
3 scheduled for trial.

4 The parties completed discovery and submitted a
5 pretrial order that was entered by the Court on July 16,
6 2018 with a corrected version entered July 18, 2018. (See
7 Docket Numbers 35-86 and 35-97.) Trial was held on July 18,
8 2018.

9 In the pretrial order, Whitebox continued to argue
10 that the parties' exchanges created a fully binding
11 agreement or, alternatively, that they created a Type II
12 agreement in which the parties had legally agreed to bind
13 themselves to certain terms and to negotiate other terms in
14 good faith.

15 When I asked about this at the outset of trial,
16 however, one of Whitebox's attorneys stated that Whitebox's
17 only contention was that the parties had reached a binding
18 Type II contract.

19 There was some considerable confusion over this,
20 at least in my mind, as two different attorneys for Whitebox
21 made statements about Whitebox's contentions that I had
22 trouble reconciling.

23 It was made emphatically clear by the end of the
24 trial, however, that Whitebox was contending only that a
25 partial Type II contract had been reached and was not

1 contending that a fully enforceable agreement on all
2 relevant terms had been reached.

3 These exchanges at the outset of the trial raised
4 other issues. In the pretrial order and at the outset of
5 the trial, Landstar took the position that the so-called
6 Type II contract issue should not be considered by the
7 Court.

8 Landstar argued that the only relevant issue
9 before the Court was whether transfers had actually
10 occurred. Landstar contended at the outset of the trial
11 that it was plain from Whitebox's changed position that
12 transfers of the claims had not actually occurred and that
13 the only contention was that Landstar had breached a
14 commitment to discuss a possible transfer, and so there was
15 nothing more that I should do.

16 The Court pointed out, however, that Whitebox's
17 reliance on the Type II contract issue did not involve any
18 element of unfair surprise. Whitebox's attorney referred to
19 this contention in a letter dated January 30, 2018, a copy
20 of which had previously been sent to the Court and had been
21 pre-marked as an agreed exhibit for the trial.

22 As I have noted here, Whitebox had also addressed
23 the issue in its May 24 submissions and in the pretrial
24 order. It was also plain and the parties acknowledged that
25 they were prepared to go to trial on the issue. After

1 discussion, Landstar agreed that the matter should proceed
2 to trial on all issues.

3 These exchanges raised questions in my mind as to
4 my jurisdiction over the parties' dispute. Plainly, the
5 parties agreed that I had jurisdiction to resolve the issues
6 that were framed by the filing of the Notices of Transfer
7 and the objection thereto. The parties conceded my
8 jurisdiction over these issues in their pre-trial order.

9 At trial I raised a question as to whether I still
10 had jurisdiction to consider the Type II contract theory in
11 the absence of other contentions. I pointed out that I have
12 jurisdiction over disputes that relate to Chapter 11 cases
13 and that this has been widely interpreted to apply to cases
14 that affect an estate.

15 However, if Whitebox were merely to be entitled to
16 seek money damages from Landstar, it was hard to see how the
17 matter would affect the bankruptcy estate.

18 Whitebox's counsel argued in response that if it
19 succeeded on its claim, it believed it would be entitled to
20 seek specific performance and that I had jurisdiction to
21 resolve that issue and to resolve all of the related
22 disputes between the parties. It insisted that I had
23 jurisdiction over all aspects of the parties' dispute from
24 the outset and should render a final decision.

25 Landstar argued initially that I should not reach

1 the Type II contract issue for the reasons that I have
2 stated. But ultimately it conceded that this was not a
3 jurisdictional issue, and after discussion, Landstar
4 explicitly agreed on the record that the Court should make a
5 final decision of the matter and that Landstar consented to
6 a final resolution of the matter by the Court.

7 It is clear that the parties' entire dispute over
8 these alleged transfers has revolved from the start around
9 the question of whether they had entered into enforceable
10 and binding contracts of any kind. The parties agreed that
11 I had clear and admitted original jurisdiction over their
12 disputes at the outset.

13 Section 13-67 of Title 28 of the United States
14 Code provides that if a District Court has original
15 jurisdiction over a matter, it also has "supplemental
16 jurisdiction over all other claims that are so related to
17 claims in the action within such original jurisdiction that
18 they form part of the same case or controversy under Article
19 III of the United States Constitution." The Bankruptcy Court
20 is a unit of the District Court that exercises the District
21 Court's jurisdiction under Section 13-34 of Title 28 of the
22 United States Code.

23 There is some disagreement in prior decisions as
24 to whether a bankruptcy court may exercise supplemental
25 jurisdiction under Section 13-67. See, for example, 16

1 Moore's Federal Practice, Section 106.05[10] at 106.34.2(1)
2 Second Edition 2012.

3 However, the Second Circuit Court of Appeals has
4 held that bankruptcy courts do have jurisdiction under the
5 principles of supplemental jurisdiction set forth in Section
6 13-67. See Klein v. Civale & Trovato, Inc., In re: Lionel
7 Corp. 29 F.3d 88, 92 (2d Cir. 1994).

8 Furthermore, as I noted, the parties agreed that I
9 had jurisdiction at the outset of these disputes. Even if
10 the issues narrowed once the trial was completed, my
11 jurisdiction was not lost. See Dery v. Wyer 265 F.2d 804,
12 808 (2d Cir. 1959). Noting the general principle that the
13 sufficiency of a Court's jurisdiction should be determined
14 once and for all at the threshold, and if found to be
15 present then, should continue until final resolution of the
16 action.

17 I concluded for these reasons, and I reaffirm
18 here, that it was appropriate for me to hear and resolve all
19 of the parties' disputes regardless of whether the nature of
20 the issues might have changed somewhat as the case
21 progressed, and regardless of whether the issues might have
22 narrowed as the case progressed. And as noted, the parties
23 agreed with that approach and agreed to my entry of a final
24 and binding ruling.

25 As to the issues, Whitebox contends that there was

1 a so-called Type II contract between the parties, pursuant
2 to which they agreed to be legally bound to a price and to
3 negotiate in good faith to complete agreement as to other
4 terms of sale. It also claims that Landstar breached this
5 agreement by abandoning the deal rather than engaging in
6 good faith negotiations.

7 As the party claims a breach of contract, it is
8 Whitebox's burden to prove the existence of the contract by
9 a fair preponderance of the evidence. See Angelo, Gordon &
10 Company, LP v. Dycom Industries, 2006 U.S. District Lexis
11 15784 SDNY, March 31, 2006 at Page 5. This is true
12 regardless of the type of contract that is alleged.

13 It is also Whitebox's burden to prove that any
14 such contract was breached, which again is subject to a
15 preponderance of the evidence standard. See Diesel
16 Properties SRL v. Greystone Bus Credit II LLC, 631 F.3d
17 42,52 (2d Cir. 2011), Mercury Partners, LLC v. Pacific
18 Medical Buildings, LP, Number 02CIV6005, 2007 West Law,
19 2197830 at Star 8, SDNY July 31, 2007.

20 Several other principles of New York law are
21 relevant to these issues. First, it is a basic tenet of
22 contract law that no contract exists unless there is an
23 offer, an acceptance of the offer, consideration, mutual
24 assent, and an intent to be bound. See Kowalchuk v. Stroup,
25 873 NYS 2d. 4346 active 2009.

1 An offer and acceptance occur if a definitive
2 offer is made and if there is an "unequivocal" acceptance of
3 that offer. See *Kolchins v. Evolution Markets, Inc.*, 31 NY
4 3d. 100, 1006, 2018. ("The first step is to determine
5 whether there is a sufficiently definite offer such that its
6 unequivocal acceptance will give rise to an enforceable
7 contract."); *Roer v. Cross County Medical Center Group*, 8380
8 2d. 861, 862, Second Department, 1981. ("It is a
9 fundamental principle of contract law that a valid
10 acceptance must comply with the terms of the offer.")

11 If a communication is subject to additional or
12 different terms, then it is not an acceptance of an offer.
13 "To enter a contract, a party must clearly and unequivocally
14 accept the offeror's terms. If, instead, the offeree
15 responds by conditioning acceptance on new or modified
16 terms, that response constitutes both a rejection and a
17 counteroffer which extinguished the original offer." See
18 *Thor Properties, LLC v. Willspring Holdings, LLC*, 118 A.D.
19 3d 505, 507-8 First Department 2014. (Internal citations
20 omitted).

21 As a result, if a purported acceptance is
22 "qualified with conditions," it is "equivalent to a
23 rejection and counteroffer." *Robison v. Sweeney*, 301 A.D. 2d
24 815, 818 Third Department 2003. This is a fundamental
25 principle of contract law. *Id*, see also *Jericho Group, Ltd.*

1 v. Midtown Development LP, 32 A.D. 3d 294, 299 First
2 Department 2006; Commerce Funding Corp. v. Comprehensive
3 Habilitation Services, Inc., 2005 U.S. District Lexis 2832
4 at Star 33, 37-38, SDNY February 24, 2005. ("A
5 communication that purports to accept an offer cannot be
6 subject to additional or different terms. Such a
7 communication is no acceptance at all, but is an absolute
8 rejection of the offer and a proposed counteroffer.")

9 Whitebox has filed papers yesterday asserting
10 that there are certain exceptions to this rule that ought to
11 be applicable to this case, but I will discuss those after
12 I've made my factual findings and when I discuss the
13 application of the law to the facts as I have found them.

14 Second, the creation of a contract requires more
15 than a conceptual agreement on terms. It requires in
16 addition an agreement to be legally bound to those terms
17 such that an enforceable obligation is created. Contracts
18 are obligations that are undertaken by agreement rather than
19 obligations that are enforced or imposed by law, and parties
20 can impose limits and conditions as to when an agreement
21 will become binding.

22 Under New York law, therefore, it is well-settled
23 that if the parties to an agreement do not intend it to be
24 binding upon them unless and until it is reduced to writing
25 and signed by both of them, they are not bound and may not

1 be held liable until it has been written out and signed.
2 Scheck v. Francis, 311 NYS 2d. 841, 843 1970. This is true
3 even if the parties have orally agreed upon all the terms of
4 a transaction. Schwartz v. Greenberg, 304 NY 250 1952;
5 Kowalchuk v. Stroup, 61 A.D. 3d 118 active 2009. See also
6 Matter of Municipal Consultants & Publications v. Town of
7 Ramapo, 47 NY 2d. 144, 148 1979; ADCO Electric Corp. v. HRH
8 Construction, LLC, 880 NYS 2d. 188 active 2009; Lost CR
9 Associates v. Marine Midland Bank, 741 NYS 2d 115 active
10 2002.

11 Courts have identified a number of factors that
12 aid in determining in a particular case whether a binding
13 contract has been formed in the absence of a document
14 executed by both sides. These factors are: One, whether
15 there is an expressed reservation of the right not to be
16 bound in the absence of a writing; two, whether there has
17 been a partial performance of the contract; three, whether
18 all terms of the alleged contract have been agreed upon;
19 and, four, whether the agreement at issue is the type of
20 contract usually committed to writing. See Winston v.
21 Mediafare Entertainment Corp., 777 F.2d 78 80 Second Circuit
22 1986.

23 These circumstances may be shown by oral testimony
24 or by correspondence or other preliminary or partially
25 complete writings. Restatement second of contract Section

1 27, Comment C (1981) (cited with approval in Winston 777 F.2d
2 at 81).

3 No single one of these factors is decisive, but
4 each can provide significant guidance in a particular case.
5 However, "considerable weight is put on a party's explicit
6 statement that it reserves the right to be bound only
7 whenever an agreement is signed." RG Group, Inc. v. Horn &
8 Hardart Co., 751 F.2d 69 75 Second Circuit 1984.

9 "When there is a writing showing that one party
10 did not intend to be bound, a court need look no further
11 than the first Winston factor." RKG Holdings Inc. v. Simon,
12 182 F.3d 901 Second Circuit 1999. (Quoting Arcadian
13 Phosphates Inc. v. Arcadian Corp., 884 F.2d 69, 72 Second
14 Circuit 1989.)

15 Third, there usually is no binding contract unless
16 there is a full agreement on all important terms.

17 "Ordinarily preliminary manifestations of assent that
18 require further negotiation and further contracts do not
19 create binding obligations." Shann v. Dunk, 84 F.3d 73
20 Second Circuit 1996, collecting cases on this point. See
21 also Brown v. Cara, 420 F.3d 148,153 Second Circuit 2005.
22 (Noting that "Ordinarily where the parties contemplate
23 further negotiations and the execution of a formal
24 instrument, a preliminary agreement does not create a
25 binding contract.")

1 (Quoting and citing Adjustrite Systems, Inc., v.
2 GAB Business Services, Inc., 145 F.3d 543 548 Second Circuit
3 1988.) "Parties can make preliminary agreements that only
4 cover certain terms and that do bind the parties to engage
5 in further discussions about open terms." See Municipal
6 Consultants & Publishers, Inc., v. Town of Ramapo, 47 New
7 York 2d.144 (1979).

8 Judge Lavelle set forth a thoughtful discussion of
9 these types of contracts in his decision in Teachers
10 Insurance & Annuity Association v. Tribune Co., 670 F.
11 Supp. 491 SDNY 1987, which is often cited as one of the
12 leading decisions on this point.

13 In that decision, Judge Lavelle observed that "In
14 seeking to determine whether a preliminary commitment should
15 be considered binding, a court's task is once again to
16 determine the intentions of the parties at the time of their
17 entry into the understanding as well as their manifestations
18 to one another by which the understanding was reached.

19 Courts must be particularly careful to avoid
20 imposing liability where a binding obligation was not
21 intended. There is a strong presumption against finding
22 binding obligation in agreements which include open terms,
23 call of future approvals, and expressly anticipate future
24 preparation and execution of contract documents.

25 Nonetheless, if that is what the parties intended,

1 courts should not frustrate their achieving that objective
2 or disappoint legitimately bargained contract expectations.
3 Teachers Insurance & Annuity Association v. Tribune Co., 670
4 F.Supp at 499.

5 Similar reservations have been expressed by the
6 New York State Courts. For example, in Kaplan v. Continuum
7 Health Partners, Inc., No. 107226/2010, 2011, New York
8 Miscellaneous Lexis 69 -- 6796, excuse me that *6, Supreme
9 Court New York County, January 11, 2011. The Court stated
10 that, "As a general matter, courts express reluctance about
11 the binding nature of letters of intent. Preliminary
12 agreements, such as a letter of intent or memorandum of
13 understanding are not intended to bind either party to the
14 contemplated transaction, except in rare circumstances where
15 the agreement clearly manifests the intent to be bound.".

16 As with contracts generally, the determination of
17 whether a binding preliminary or Type II agreement has been
18 reached involves a determination as to the intent of the
19 parties. If, as noted above, the parties have clearly
20 reserved the right not to be bound at all, unless and until
21 a written agreement is signed, then that also precludes
22 contentions that there is a Type II contract, and there is
23 no contract at all, unless and until a written agreement is
24 signed.

25 I will now turn to the evidence at trial. At

1 trial on July 18, each party submitted a binder of exhibits
2 and the full contents of the binders were admitted into
3 evidence by agreement. Landstar offered an additional
4 binder, Landstar Exhibit 21, containing copies of other
5 transfer notices that Whitebox had submitted in the
6 Westinghouse case.

7 I ruled that these could be submitted in evidence,
8 but that Whitebox would be granted additional time through
9 5:00 PM on July 19, to state whether it had any objections
10 to the authenticity of the documents included in the binder.
11 Whitebox has confirmed that it has no authenticity
12 objections, and so, Landstar Exhibit 21 is part of the
13 record and the record was deemed to be closed at 5:00 PM on
14 July 19, yesterday.

15 Four witnesses testified at the trial: The first
16 witness was Mr. James Belardo of Seaport. Mr. Belardo is
17 the individual who engaged in the relevant communications
18 with Landstar about this matter;

19 The second witness was Mr. Peter Lupoff. Mr.
20 Lupoff was presented as an expert witness as to the claims
21 treating process;

22 The third witness was Ms. Dawn Bowers. Ms. Bowers
23 is an employee of Landstar who had communications with Mr.
24 Belardo and who allegedly committed Landstar to an
25 enforceable Type II contract with Whitebox;

1 The fourth witness was Mr. Amit Patel. Mr. Patel
2 works for Whitebox Advisors and testified about his role in
3 the transaction.

4 I have read and carefully considered all of the
5 exhibits. I note that multiple copies of email chains had
6 been produced, but there are some differences in the chains,
7 and some exhibits includes copies of emails that do not
8 appear in other exhibits.

9 So with the assistance of my law clerk, Ms.
10 Eisenberg, we have carefully combed through the exhibits to
11 identify and chronologize all of the emails for the purpose
12 of these findings.

13 I have also carefully listened to the witnesses'
14 testimony at trial, and I have made assessments of their
15 credibility.

16 I find the following facts based on the trial
17 record: Mr. Belardo testified that he reviewed filed proofs
18 of claim to identify parties who had filed claims, and then
19 contacted them to determine if they would be willing to sell
20 their claims. Mr. Belardo contacted Ms. Bowers for this
21 purpose by email on January 10, 2018.

22 The witnesses acknowledged that Mr. Belardo and
23 Ms. Bowers did not know each other, had had no prior
24 business dealings, and had not engaged in prior discussions
25 with each other.

1 In all of the discussions that follow, Mr. Belardo
2 was acting on behalf of his client, Whitebox. There is no
3 contention that Mr. Belardo ever was an agent of Landstar or
4 that he represented Landstar, and there was no evidence at
5 trial that would have been sufficient to support a
6 contention that Seaport acted for anyone other than
7 Whitebox.

8 Mr. Belardo sent a follow-up email to Ms. Bowers
9 on January 23, 2018, stating that he had a client,
10 "interested in buying the unsecured claims in the 70s",
11 meaning at a price equal to 70 plus percent of the stated
12 amounts of the claims. He asked if that, "sparks any
13 interest". And Ms. Bowers responded that same day by
14 saying, yes, and by asking which claims the client might be
15 interested in. Mr. Belardo responded the client would be
16 interested in all of Landstar's claims, and the parties
17 arranged a call, in order to have a further discussion.

18 Ms. Bowers testified credibly that during their
19 phone call, she told Mr. Belardo that she had authority to
20 negotiate a price at which the Landstar claims might be
21 sold, but that all other terms had to be reviewed and
22 approved by legal counsel.

23 Mr. Belardo testified that he did not believe that
24 Ms. Bowers made such a statement, but he also acknowledged
25 that he did not have a full recollection of the details of

1 their calls.

2 I find that Ms. Bowers testimony on this point is
3 credible, and I find that the statement was made.

4 Mr. Belardo then gave Ms. Bowers advice as to how
5 she could initiate a potential sale. By email on January
6 24, 2018, he advised Ms. Bowers that, "In order to engage my
7 client", he would need a "sell order" or "offer" end by
8 email. He also sent her the text of a typical sell order.
9 See Defendant's Exhibit 1.

10 The language that Mr. Belardo suggested stated
11 that, "Landstar agrees to sell its unsecured claims against
12 Westinghouse," with the amounts of the claims and the
13 percentage sale price to be filled in by Ms. Bowers. The
14 form suggested by Mr. Belardo also said that, "This offer
15 shall be subject to agreement of terms and conditions and
16 execution of documentation by both buyer and Landstar." It
17 also included language pursuant to which the offer would
18 expire if not accepted by a particular time.

19 Ms. Bowers talked to her superior about the form
20 of the proposed sell order that Mr. Belardo had sent. Ms.
21 Bowers testified credibly that she and her superior were
22 comfortable; that the language that Mr. Belardo had sent,
23 including, in particular, the statement that the offer was
24 subject to an agreement on terms and the execution of
25 documentation, meant that Landstar would not be bound unless

1 and until a written contract was executed; that, among other
2 things, met with the approval of Landstar's internal
3 counsel.

4 Based on my own questions to Mr. Belardo at trial,
5 I find that he, too, understood the subject to language to
6 have this meaning and effect. Whitebox elicited general
7 testimony from Mr. Belardo, that he felt that parties should
8 negotiate in good faith once they reached conceptual
9 agreement on price. However, he acknowledged he did not
10 know if there was such a legal obligation.

11 More importantly, when I asked him specifically
12 about the fact that the offer language he had sent to Ms.
13 Bowers was "subject to" execution of a written agreement, he
14 acknowledged that the words "subject to" meant that there
15 was no deal unless and until a written agreement was signed.

16 After her discussion with her superior, Ms. Bowers
17 sent an email to Mr. Belardo that stated in full as follows:

18 "Landstar agrees to sell its unsecured claims
19 against Westinghouse in the total amount of \$754,470.56 at
20 78 percent; this officer shall be subject to agreement of
21 terms and execution of documentation by both buyer and
22 Landstar. This offer shall be exclusive to Seaport and its
23 client, but shall expire at 3:00 PM on 1/24/18." This email
24 was sent on January 24, 2018 at 10:45 AM. See Defendant's
25 Exhibit 2.

1 Mr. Belardo then sent Ms. Bowers an email at 11:00
2 AM, stating that he had, "A few questions on the claim
3 amount," and asking Ms. Bowers to give him a call. Ms.
4 Bowers testified that she believes that she and Mr. Belardo
5 discussed the sizes of the Landstar claims, and that she
6 believes there were some questions about the amount of the
7 Landstar Logistic claims and whether that filed claim
8 different from the amount that Westinghouse had listed on
9 its schedules of assets and liabilities.

10 She also testified that Mr. Belardo asked if
11 Landstar could support the amount of the filed claims, and
12 Ms. Bowers testified that it could.

13 I should note that the record was not crystal
14 clear as to whether these particular points were discussed
15 during a phone call that occurred prior to sending the so-
16 called offer or whether they occurred after Mr. Belardo sent
17 his request for a further call about the claims themselves.
18 The emails suggest that there were two calls, but the
19 witnesses did not appear to recall for certain how many
20 calls they had or when each statement was made.

21 In context, however, it makes sense that the
22 conversation about the claims happened after Mr. Belardo
23 sent his email at 11:00 AM stating that he had questions on
24 the claim amounts. If the discussion had already happened
25 before the sell offer was sent, then, presumably, Mr.

1 Belardo would not still have had questions.

2 I find that these parts of Mr. Belardo's and Ms.
3 Bowers' discussions took place after the "sell order" had
4 been sent.

5 During their second call after the sell order had
6 been sent, Mr. Belardo noted that one of the Landstar claims
7 had been filed in an amount that exceeded \$700,000, but that
8 the Debtor's schedules of assets and liabilities had listed
9 only a small amount of about \$81,000. Ms. Bowers explained
10 the reasons why she thought the filed amount was valid. She
11 testified that she believes Mr. Belardo asked her whether
12 Landstar could support the claim and that she testified that
13 she thought it could. Mr. Belardo then spoke to others at
14 Seaport about the potential sale.

15 The record shows that at 11:28:17 AM on January
16 24, Rick Feinstein, another Seaport employer, sent a
17 Bloomberg instant message to representatives of Whitebox,
18 noting the potential sale of a, "754k Westinghouse claim"
19 for which, "my cost", that is, the cost without Seaport's
20 commission, would be 78 percent.

21 The record shows that Mr. Feinstein did not
22 participate in any of the phone calls with Ms. Bowers. He
23 said in his instant message, though, that there was
24 potential, "counterparty risk" since the scheduled amount of
25 the debt differed from the filed claim, and he described the

1 explanation that had been provided by Landstar.

2 Mr. Feinstein also stated in his email that, "They
3 are willing to provide recourse as to the \$754k as they are
4 very confident. They would not want funding based on \$80k.
5 It is a public company, so should be easy to review
6 financials."

7 It is difficult to know exactly where Mr.
8 Feinstein got the information that he gave to Whitebox. Mr.
9 Feinstein did not participate in the calls between Ms.
10 Bowers and Mr. Belardo. Ms. Bowers testified that there was
11 a discussion about the claim amount, but that there was
12 never any discussion of an agreement pursuant to which
13 Landstar would provide recourse as to the notional amount of
14 the claim. In addition, she testified that there was never
15 any discussion as to whether Landstar would pay interest on
16 any recourse payment.

17 Mr. Belardo testified that he believed he had told
18 Ms. Bowers that Landstar would have to make representations
19 about the validity of the claims, but he said he did not
20 have a clear recollection of the conversation.

21 More importantly, no testimony was offered from
22 Mr. Belardo to the effect that Ms. Bowers, or anyone else at
23 Landstar, had actually made the statement that appears in
24 Mr. Feinstein's email about a willingness to provide
25 recourse for the -- as to the claims.

1 To the contrary, Ms. Belardo testified that she
2 never had a conversation -- or excuse me. To the contrary,
3 Ms. Bowers testified that she never had a conversation with
4 Mr. Belardo about providing recourse for the claims.

5 I find that Ms. Bowers testified on this point was
6 credible. There is nothing in the testimony of Mr. Belardo
7 and Ms. Bowers that would support a contrary finding. Ms.
8 Bowers testified consistently that she was only willing and
9 able to discuss the price at which claims might be sold, and
10 that she had no authority and could not enter into
11 negotiations as to any other terms.

12 I find, therefore, that in their conversations,
13 Ms. Bowers did not state that Landstar would provide
14 recourse of the claims. Instead, as she acknowledged, she
15 only expressed confidence that the claims were good.

16 After receiving Mr. Feinstein's message, Mr. Patel
17 of Whitebox asked for copies of the relevant proofs of
18 claim. At 11:33:33 AM on January 24, he also asked, "How
19 much interest on disallowance can they live with?" Mr.
20 Friedberg, another Seaport employee, responded, "Dunno, 5-6
21 percent." Mr. Patel responded, "That's fine," and "Let's
22 lock it up." See Defendant's Exhibit 14.

23 One thing on which the parties do agree is that
24 Mr. Belardo and Ms. Bowers had not had any discussions about
25 the possibility that Landstar would pay interest on a

1 recourse claim. Both Mr. Belardo and Ms. Bowers so
2 testified.

3 In some way that is not clear from the record, Mr.
4 Patel's interest in pursuing your purchase of the claim was
5 communicated to Mr. Belardo.

6 At this point, Mr. Belardo responded by email to
7 the sell offer that Ms. Bowers had sent. He did not simply
8 accept the deal on the precise terms that Ms. Bowers had
9 listed in the email form that he himself had previously
10 provided to her. Instead, he sent an email at 11:42 AM that
11 said, in its entirety, the following:

12 This email confirms that we are "done". Seaport's
13 client, "buyer" buys, and Landstar's "seller" sells,
14 \$754,470.56 of unsecured claims against Westinghouse at 78
15 percent, subject to: and then three bullet items were
16 listed. First, agreement of terms and execution of
17 documentation agreeable to both buyer and sell Landstar.
18 Second, buyer's satisfactory due diligence on the claims
19 being sold. And the third bullet item, Landstar providing
20 recourse as to the notional amount of the claims; any
21 repayment under such provision shall include 5 percent
22 interest."

23 The message continued: "Please respond to this
24 email in the affirmative confirming the above, after which I
25 will provide a Trade Confirmation for your review. We very

1 much look forward to working with you on this." See
2 Defendant's Exhibit 8.

3 As I noted, Mr. Belardo himself had drafted the
4 sell order that Ms. Bowers had sent. That sell order
5 included no reference to any protection as to the notional
6 amounts of the claims and no reference to any requirement
7 that a recourse payment would include interest of any
8 amount. These were new terms that Seaport included in the
9 email that it sent on behalf of Whitebox, after it had
10 conversations with Landstar about the disparity between the
11 filed amount and the scheduled amounts and after different
12 personnel at Whitebox -- excuse me -- at Seaport had
13 discussion with Mr. Patel about potential interest paid.

14 Furthermore, Mr. Belardo made quite clear in his
15 email that the 78 percent purchase price was only
16 acceptable, "subject to" the other listed terms, including
17 the requirement that Landstar provide recourse and agree to
18 pay interest on any recourse payment.

19 There was no unequivocal acceptance of the sale
20 offer, as set forth by Ms. Bowers. Instead, there was only
21 a conditional response, which included new terms, and which
22 clearly communicated that an agreement on the purchase price
23 was, "subject to" these other terms.

24 Ms. Bowers did not respond in the affirmative to
25 Mr. Belardo's email. Instead, within six minutes, she

1 responded with a statement of concern and a request for
2 reassurance. More particularly, she said the following in
3 an email at 11:48 AM:

4 "James, I just want to get some clarity here. Why
5 am I agreeing to the terms below? Does this commit Landstar
6 to the deal before we see the actual trade confirmation? My
7 legal department will need to review any documents that need
8 to be signed."

9 The parties disagree as to the significance of
10 this statement and what it meant. I find, after considering
11 the evidence and the credibility of the witnesses, that this
12 was a plain statement by Ms. Bowers that Landstar did not
13 wish to be bound right away and did not wish to be bound
14 unless and until there was a written agreement that had also
15 been reviewed and approved by counsel and then signed.

16 I find that Ms. Bowers intended the message in
17 this way, that the message fairly communicates that intent,
18 and that Mr. Belardo understood the message in this way.
19 The statement was a forthright, reasonable and clear notice
20 to Seaport that Landstar did not intend to be bound, unless
21 and until a signed written agreement had been presented, the
22 language and all of the terms were approved by counsel, and
23 the writing had been executed.

24 Mr. Belardo responded in an email at 12:06 PM on
25 January 24. He stated: "This commits both you (and my

1 client) to the 78 percent purchase price, subject to -- and
2 then there's an italicized phrase -- agreement of terms and
3 execution of documentation -- end of the italics. We just
4 want to make sure we are all conceptually on the same page
5 regarding terms before spending additional efforts
6 (including time/money on attorneys) reviewing/negotiating
7 the Trade Confirm. Of course, you will need to agree to,
8 and ultimately execute, both a Trade Confirmation and then
9 an assignment of claim document."

10 Whitebox argues that this statement was intended
11 to convey that a legally binding agreement was now in place
12 as to a sale at the stated price, coupled with a binding
13 agreement that the parties would negotiate the rest of the
14 terms. Certainly, the statement that the email "commits"
15 the parties to a purchase price provides some support for
16 this contention.

17 In context, however, I find that Whitebox's
18 argument is not a credible or reasonable explanation of the
19 email exchange. What Landstar plainly asked and what it
20 plainly wanted to confirm was that Landstar was not bound to
21 a deal unless and until a written confirmation was reviewed
22 and signed.

23 Seaport's reassurance in response to Landstar's
24 expression of concern was that the concept of a deal had
25 been discussed and that Seaport wanted to be sure the

1 parties were "conceptually" on the same page before working
2 out the full terms.

3 Seaport also reassured Ms. Bowers in an italicized
4 statement that any commitment to a price was "subject to
5 agreement of terms and execution of documentation."

6 Saying that a deal is subject to documentation may
7 not always mean that the parties agree that they are not
8 bound and unless and until a written agreement is signed.
9 But in this case, I find that that is exactly what the
10 statement conveyed, and that is exactly what the statement
11 was intended to convey to Ms. Bowers.

12 Landstar expressed its concern and the response
13 was that there was only a conceptual understanding that was
14 subject to further discussion, documentation and agreement.

15 Whitebox's contention that somehow this statement
16 confirmed the actual existence of a binding agreement is
17 belied by the full context and the wording of the exchanges.
18 In fact, the statement was intended to, and it did, convey
19 to Ms. Bowers that there was no binding agreement at that
20 time of any kind.

21 After receiving Mr. Belardo's email, Ms. Bowers
22 responded by an email at 12:11 PM. She stated, "Sounds
23 good. Please send the documents so I can get the review
24 period stated."

25 There was some contention at trial that the

1 "sounds good" statement was an acceptance of Mr. Belardo's
2 proposal; in context, it very plainly was not. The thing
3 that "sounded good" to Ms. Bowers was that this was just a
4 conceptual set of terms that were not yet binding. She made
5 quite clear that she did not have authority to agree to the
6 additional terms that had been proposed, that she would not
7 be the one who would negotiate them, and that such terms
8 required review and discussion by counsel.

9 In addition, Whitebox also acknowledged at trial
10 that there never was an agreement on the recourse provision.
11 Plainly, it cannot contend that the sounds good statement
12 was an acceptance of the proposed recourse provision because
13 Whitebox itself acknowledges that that term was never agreed
14 to.

15 A draft confirmation was then circulated by
16 Seaport. The confirmation itself said it would be effective
17 and would be binding after it had been executed by the
18 parties. At that point, Landstar's internal counsel got
19 involved to discuss the confirmation, and more particularly,
20 the proposed recourse provisions.

21 Ms. Bowers testified that she had no further
22 involvement in the discussions and that counsel was in
23 charge of those items.

24 The emails reflect that there were discussions and
25 that Seaport pressed Landstar for comments on the draft

1 confirmation. Instead, however, Michael Woodruff, an
2 internal counsel at Landstar, informed Mr. Belardo via email
3 on January 26 at 2:31 PM that, "Landstar is going to have to
4 remove itself from this offering at this time." The email
5 was some cryptic as to the reasons. It stated only that,
6 "We did a risk analysis and the figures and calculations
7 didn't work for us."

8 However, at trial, Whitebox's counsel elicited
9 testimony from Ms. Bowers about her conversations with
10 counsel. And she stated that counsel had explained that the
11 proposed recourse and interest provisions were the reasons
12 why Landstar had decided not to go forward.

13 I should note that at various times during the
14 trial, Whitebox speculated that Landstar might have backed
15 out of the deal for another reason, such as the possibility
16 that claims values were going up in the trading market, but
17 no evidence was offered that claims values actually changed
18 or that Landstar was aware of any change in claims values,
19 and there was absolutely no evidence that concerns over the
20 78 priced -- 78 percent price were the reasons why the deal
21 fell apart.

22 The only evidence presented to me was that
23 Landstar did not wish to agree to the proposed recourse
24 terms and to the proposed agreement to pay interest on any
25 recourse payment. And I find that these reasons, and not

1 any speculative alternative reasons, were the reasons why
2 Landstar decided not to go forward.

3 Whitebox offered testimony as to what it believed
4 are certain customs in the claims trading business. But
5 rather than review that evidence here, I will discuss it in
6 the context of my application of the governing law to the
7 facts as I have found them.

8 Turning to the application of the law to the
9 facts: first, I conclude that there never was a binding
10 offer and acceptance sufficient to create a contract of any
11 kind. Mr. Belardo himself drafted the offer to be sent by
12 Ms. Bowers. It mentioned only a price at which the relevant
13 claims would be sold. Mr. Belardo then realized that there
14 might be some risk as to allowance of the full stated amount
15 of the claims. And so, when he responded on behalf of
16 Whitebox, he inserted a new term that he himself had never
17 included in the offer form that he had drafted. That term
18 was a requirement that Landstar provide recourse as to the
19 notional amount of the claim.

20 In addition, Mr. Belardo's response stated that
21 Whitebox's willingness to buy the claims was subject to an
22 agreement that 5 percent interest be paid on any recourse
23 payment. The parties agree that there was never any prior
24 discussion of that notion.

25 In context, this was a counteroffer, not an

1 unequivocal acceptance of the offer that Ms. Bowers made.

2 It introduced new terms and expressly conditioned an
3 agreement on price to an agreement on these other terms.

4 At the conclusion of the trial on July 18, I asked
5 the parties to make further submissions to the Court on the
6 issue of whether Mr. Belardo's email should be considered a
7 counteroffer rather than an acceptance, and the parties made
8 those submissions at approximately 5:00 PM yesterday.

9 In its submission, Whitebox did not dispute the
10 general rules that I have decided above. However, Whitebox
11 argued that the recourse provisions were not really new
12 conditions; that, instead, they were merely terms that,
13 "would otherwise be implied in fact or in law from the
14 offer," citing Richard A. Lord, Williston on Contracts,
15 Section 6:15 (4th Edition, 2002).

16 Whitebox's theory is that the recourse provision
17 was not a new term at all, but that a recourse provision was
18 necessarily implicit in the offer that Ms. Bowers had sent.
19 Whitebox also argued, in the alternative, that the recourse
20 language was inconsequential and not significant enough to
21 turn its alleged acceptance into a counteroffer.

22 However, the evidence at trial simply does not
23 support Whitebox's contentions. First, the parties made
24 clear at trial that buyers of claims often ask for recourse
25 provisions, but Ms. Bowers plainly was not a professional

1 buyer or seller of claims.

2 There's no evidence that she understood the
3 concept of a recourse provision at all. That may not have
4 seemed unusual to Whitebox or Seaport, but it certainly was
5 unusual to Ms. Bowers and to Landstar, and there had not
6 even been any discussion of the point at the time Ms. Bowers
7 sent her sell order.

8 Under those circumstances, the facts simply would
9 not support a finding that a recourse term was implied in
10 fact or implied in law in the offer that Ms. Bowers had
11 sent.

12 The witnesses at trial also made clear that while
13 recourse provisions are usually negotiated, there are many
14 occasions in which parties do not include recourse
15 provisions in their deals. Furthermore, the interest
16 provision had never been discussed. And certainly, there is
17 nothing in the offer to sell that implicitly suggests that
18 interest will be paid on a recourse obligation, let alone as
19 to a particular interest rate.

20 I should also note there that although Whitebox
21 initially took the position that there was a full agreement
22 on terms, at trial, it agreed that there never was an actual
23 agreement as to the recourse provision. Its contention was
24 that Landstar had breached an obligation to have further
25 discussions about the point. Whitebox went so far as to

1 admit that if the parties had not reached agreement on the
2 recourse issue after good faith discussions, then there
3 would have been no deal and that Landstar could have walked
4 away.

5 Whitebox cannot reconcile those concessions with
6 its current contention that the recourse provision was
7 merely a point that was already clear and implicit in the
8 sell order as either an implied in fact or an implied in law
9 term.

10 Whitebox, in its own contentions about the alleged
11 Type II contract, has acknowledged and agreed that the
12 recourse items were open terms that had not been agreed upon
13 and that required further negotiation and agreement.

14 If I were to accept Whitebox's new contention that
15 these terms were already implicit and necessarily had
16 already been included in the sell order itself, that would
17 contradict Whitebox's own arguments and admissions about the
18 alleged Type II agreement and about the consequences of the
19 parties' exchanges.

20 Whitebox has clearly acknowledged that the
21 recourse items were open points about which no agreement was
22 reached; that cannot now turn around and argue after trial
23 that they were implied points that were already necessarily
24 resolved and already agreed upon back when the original
25 offer was sent. Nor is there any factual support for

1 Whitebox's alternative contention that these new terms were
2 not important conditions or qualifications.

3 Whitebox's own witnesses, including its expert
4 witness, testified that a recourse provision is of key
5 importance to a buyer. The expert testified that he would
6 usually recommend against doing a deal without such a
7 provision.

8 I, therefore, find and hold that Seaport's
9 response to Ms. Bowers' email was a counteroffer, not an
10 acceptance.

11 As I noted earlier, at trial, there was some
12 suggestion that Ms. Bowers had accepted the counteroffer
13 when she responded by email, sounds good. But in context,
14 as I have held, what she actually sought to confirm and what
15 was actually communicated to her by Mr. -- that was actually
16 communicated by her to Mr. Belardo was that there was no
17 legal commitment at that time and that further terms were to
18 be discussed.

19 And Whitebox, as I have noted in making its own
20 Type II contract argument, contends only that there was an
21 agreement on price and not an agreement on other terms.

22 As a counteroffer, Mr. Belardo's email cancelled
23 and nullified the original offer sent by Ms. Bowers.
24 Landstar was free either to accept or reject the
25 counteroffer. It never accepted it, and after two days of

1 discussions, it made clear that it rejected the
2 counteroffer. As a result, there was no contract.

3 Whitebox, in arguing that a Type II contract was
4 formed, also asks me, in effect, to deconstruct the
5 counteroffer into separate pieces. It says that since the
6 price was the same in both the offer and the counteroffer, I
7 should treat the counteroffer as an acceptance of the posed
8 price and as a preliminary agreement to negotiate other
9 terms.

10 However, it is often the case that there is an
11 overlap between an offer and a counteroffer. I could offer
12 to sell my car for \$3,000, and I might receive a
13 counteroffer that says the buyer is willing to pay \$3,000,
14 so long as I agree to pay any repair expenses that the buyer
15 incurs over the next year. Plainly, that is a counteroffer,
16 not an acceptance. The price mentioned in the two
17 communications is the same, but the law does not treat that
18 as an acceptance or as a preliminary agreement that
19 obligates the parties to have further discussions.

20 The notion that a Type II contract was formed
21 depends on a contention that the parties actually agreed:
22 one, to be legally bound by certain terms; and two, to work
23 together in good faith on other open items.

24 The message sent by Mr. Belardo cannot reasonably
25 be interpreted as an offer to form such a contract. It did

1 not say, for example, that the buyer agrees to pay the price
2 Mr. -- Ms. Bowers suggest, so long as the parties commit
3 themselves in good faith to negotiate other terms. Even
4 that would have been a counteroffer, though it would have
5 been one that, if accepted, might have created a Type II
6 contract.

7 Here, the actual wording of the message sent by
8 Mr. Belardo defies Whitebox's contention that a Type II
9 contract was even offered, let alone reached. The email
10 stated that Whitebox's agreement to pay a particular price
11 was subject to other terms that were set forth. It was not
12 an offer to be bound by a price term, coupled with a
13 commitment to negotiate other provisions.

14 By its express terms, it was an offer to accept
15 the price if -- and only if -- another particular term were
16 included in the deal. By its terms, the deal was presented
17 as a package, not as a partial agreement to one term, to be
18 followed by a negotiation of other terms.

19 Whitebox also argues that the customer had
20 practice in the claims trading business is that when parties
21 have reached an agreement on price, they understand that
22 they should negotiate in good faith on other terms.

23 This testimony was extremely vague and self-
24 serving. It described the general practices of traders who
25 regularly deal with each other in this field, but it stopped

1 far short of showing that parties customarily understand
2 that they have made legally binding Type II contracts
3 whenever they agree on price and regardless of whether other
4 terms have been proposed.

5 I am particularly concerned about this contention,
6 because in other reported cases, parties in this same
7 industry have taken very different positions as to what the
8 alleged revealing customs are in the industry and as to
9 whether people in the industry believed that any agreement
10 of any kind is formed in the absence of a signed contract.

11 In fact, an affiliate of Seaport has itself
12 successfully argued in New York State Court that a stock
13 trade had no binding effect of any kind because the trade
14 communications said that the deal was "subject to" the
15 execution of written documents. The State Court case is
16 Luxor Capital Group, L.P. v. Seaport Group, LLC. The Trial
17 Court decision is reported at 2016 New York Misc. Lexis 1454
18 (April 15, 2016) and the decision on appeal is reported at
19 148 A.D. 3rd 590 (2017). I will have more to say about that
20 decision in a few minutes.

21 I reject the contention that there is a custom in
22 the industry to the effect that communications of the type
23 that occurred here purportedly give rise to enforceable
24 obligations or to partial binding agreements on terms. The
25 vague testimony at trial did not support the existence of

1 any such custom.

2 Furthermore, custom is relevant to the extent that
3 it provides evidence of what a party intends. There is no
4 evidence that Ms. Bowers or anyone else at Landstar had any
5 familiarity with the alleged customs of people who more
6 regularly deal with each other in the trading of claims.

7 If claims traders want their customs to be binding
8 when they deal with non-professionals like Ms. Bowers, it is
9 incumbent on them to set forth the terms in a clear and
10 unequivocal way. Contracts are supposed to be matters of
11 voluntary agreement; they are not supposed to be traps for
12 the innocent and unwary.

13 Accordingly, if Seaport had intended that there be
14 a binding Type II contract, it could and should have clearly
15 and explicitly asked Landstar to confirm that the parties
16 had an enforceable agreement as to price and that the
17 parties were entering into a binding and enforceable
18 agreement to negotiate other terms in good faith.

19 Perhaps Seaport does not use such language because
20 it thinks sellers, such as Landstar, would be scared off by
21 it. But if a party would not have agreed to an explicit
22 agreement of the kind alleged, then a court certainly should
23 not impose such terms after the fact.

24 In any event, I find that the alleged customs are
25 not sufficient to override the plain meaning and effect of

1 the communications that the parties actually had in this
2 case. Seaport's response was a counteroffer that was never
3 accepted, and there is nothing in the purported customs in
4 the industry that supports giving the communications a
5 different legal effect.

6 Second, and as an independent reason why no
7 binding contract was formed, I find, based on the evidence,
8 that no contract of any kind could have been formed because
9 Landstar, through Ms. Bowers, had clearly indicated its
10 intention not to be bound to any term, unless and until a
11 full written agreement on all terms was signed and executed.

12 As I mentioned earlier, courts have identified
13 four factors to be considered in determining whether a party
14 has an expressed an intention not to be bound in the absence
15 of a written agreement. The factors are: one, whether there
16 is an expressed reservation of the right not to be bound in
17 the absence of a writing; two, whether there has been
18 partial performance of the contract; three, whether all
19 terms of the alleged contract have been agreed upon; and
20 four, whether the agreement at issue is the type of contract
21 usually committed to writing. See, for example, *Winston v.*
22 *Mediafare Entertainment Corp.*, 777 F.2d 7880 (2nd Circuit,
23 1986) .

24 These factors differ slightly when parties contend
25 that a Type II contract had been reached. In such a case,

1 the third factor listed in Winston, i.e., whether all terms
2 have been agreed upon, will always involve a situation in
3 which all the terms exist. But, otherwise, the factors are
4 quite similar.

5 A court should consider: (a) whether the intent to
6 be bound on a partial or preliminary basis is revealed by
7 the language of the agreement; (b) the context of the
8 negotiations; (c) the existence of open terms; (d) partial
9 performance; and (e) the necessity of putting the agreement
10 in final form, as indicated by the customary form of such a
11 transaction. See *Brown v. Cara*, 420 F.3d, 148-157 (2nd
12 Circuit, 2005).

13 As to the first factor, I find that there was a
14 clearly expressed reservation of a right not to be bound,
15 either in full or to a partial set of terms, and the absence
16 of the execution of a written contract. As I have noted, I
17 find that the whole purpose and the understood intent of Ms.
18 Bowers emails to Mr. Belardo after receiving his
19 counteroffer was to reconfirm what she had previously said
20 orally; namely, that the completion of a deal required the
21 approval of other people, including internal lawyers, and
22 that there would be no agreement unless and until a written
23 contract was signed.

24 I find that this position was communicated orally
25 to Mr. Belardo prior to the time when Ms. Bowers sent the

1 sell order that Mr. Belardo had drafted. I find that Ms.
2 Bowers clearly confirmed it in the email exchanges with Mr.
3 Belardo, in which she asked him to clarify that Landstar
4 would not be bound, and in which he responded that there was
5 just "conceptually" on agreement on price, that "of course"
6 was subject to further agreements on terms and entry into
7 written agreements.

8 I also find that in this particular case, both
9 parties understood that the language in the offer that Mr.
10 Belardo drafted, to the effect that the offer and any
11 agreement would be "subject to" an agreement on terms and
12 execution of a written contract was an explicit reservation
13 of a right not to be bound at all, unless and until a
14 written agreement was signed.

15 On this particular point, Whitebox has argued
16 that, as a matter of law, I should treat the subject to
17 language as though it had no particular effect, or at least
18 only limited effect. In support of that proposition,
19 Whitebox has cited to the decision by the New York Court of
20 Appeals in Stonehill Capital Management, LLC v. Bank of the
21 West, 28 NY 3d. 439 (2016).

22 In that case, a party conducted an auction sale of
23 a syndicated loan. The auction terms stated that a buyer
24 would be required to execute a purchase agreement in a form
25 that was provided with the auction terms. The auction terms

1 also stated that bids would be fully binding offers and
2 would be fully binding when accepted.

3 A bid was submitted and then accepted. However,
4 the written acceptance said that the bid was accepted,
5 "subject to mutual execution" of an acceptable sale
6 agreement. The seller then later sought to back out of the
7 deal.

8 In Stonehill, the Court held that the acceptance
9 of an auction bid usually forms a binding contract, that the
10 offering memo for the auction said explicitly that bids were
11 non-contingent, final and binding officers, and told bidders
12 they would be required to execute a sale agreement in a
13 specified previously disclosed form. It also found that the
14 parties' correspondence indicated that they understood that
15 a binding deal was in place after the auction was finished.

16 In light of these facts, the Court held that under
17 the "totality of the circumstances" of that particular case,
18 the seller's reference to the "mutual execution" of an
19 agreement was not enough to avoid the contract. Given that
20 the terms of the sale had been preset and that parties had
21 effectively been told that a binding contract would be
22 formed when a bid was accepted, the Court held that the use
23 of the subject to language in that particular case was not
24 enough to show that the parties did not intend to be bound.

25 Importantly, the Court noted that accepting the

1 seller's view of the significance of that language would
2 have contradicted other terms of the auction. It would have
3 meant that the auction was not final and binding; whereas,
4 the auction terms had explicitly said otherwise.

5 In Stonehill, the Court of Appeals cited the three
6 other decisions. The first was Emigrant Bank v. UBS Real
7 Estate Securities, Inc., 49 A.D. 3rd, 382 (2008). Emigrant
8 Bank also involved an accepted auction bid on the sale of a
9 mortgage loan portfolio. The bid form that was submitted
10 said that a sale was "subject to a mutually acceptable
11 purchase and sale agreement, which will be subject to
12 negotiation but substantially in the form of the agreement
13 posted to the bidding website.

14 The buyer added as a condition that, "a mutually
15 acceptable mortgage loan sale and servicing agreement will
16 be negotiated in good faith.

17 The Court in Emigrant held that a motion to
18 dismiss should have been denied. As in the context of that
19 particular case, the subject to language did not
20 unmistakably and automatically and as a matter of law
21 condition an agreement on the execution of a definitive
22 contract.

23 The second decision cited in Stonehill was Bed
24 Bath & Beyond, Inc. v. Ibex Construction, LLC, 52 A.D. 3rd
25 413 (2008). In Bed Bath & Beyond, the Court held that a

1 letter of intent in connection with a construction project
2 was a binding agreement.

3 While the language of the letter of intent was not
4 quoted in the opinion, the Court held that the plain
5 language of the letter of intent manifests the parties'
6 intent to be bound by its terms.

7 Since other terms plainly manifested that intent,
8 the use of "subject to language" elsewhere in the agreement
9 did not, in that particular case, amount to an express
10 reservation of a right not to be bound or a condition
11 precedent to the contract.

12 The third cited decision in Stonehill was Eastern
13 Consolidated Properties, Inc. v. Morrie Golick Living Trust,
14 83 A.D. 3d 534 (1st Department, 2011). In that case, a
15 broker contended that it had obtained a buyer who was ready,
16 willing and able to buy a property. However, the deal memo
17 between parties stated that it was subject to the signing of
18 a mutually agreeable contract of sale.

19 The Court held, on the strength of this language,
20 that the deal memo was "a classic example of an agreement to
21 agree" that did not constitute a binding contract of any
22 kind and that did not trigger any duty of good faith
23 negotiation and that, in light of the language, there was no
24 triable issue of fact.

25 Given these three cases cited with approval in

1 Stonehill, and in particular, Stonehill's citation to the
2 Eastern Consolidated Properties decision, the Stonehill
3 decision simply cannot reasonably be read as a general
4 ruling that the "subject to" language as either meaningless
5 or of no import.

6 In fact, there is an extremely long line of
7 decisions in both the State Courts and the Federal Courts
8 that have relied on such "subject to" language, as clearly
9 indicating that parties have reserved a right not to be
10 bound in the absence of a fully negotiated and executed
11 written contract.

12 Just a partial list of these cases includes the
13 following: Tebbutt, T-E-B-B-U-T-T, v. Niagara Mohawk Power
14 Corp., 508 NYS 2nd 69 at 1986 (acceptance of a purchase
15 offer "subject to agreement on the terms of this sale,"
16 coupled with a statement that if the terms were
17 satisfactory, "we can proceed to prepare whatever contract
18 documents may be required," indicated without room for
19 dispute that the parties only intended to be bound if and
20 when a written agreement was executed).

21 Reprosystem, BV v. SCM Corp., 727 F.2d 257 262
22 (2nd Circuit 1984) (an intent not to be bound in the absence
23 of a written agreement was "conclusively established" when
24 the proposed contracts stated that agreements would be
25 binding "when executed and delivered").

1 RG Group, Inc. v. Horn & Hardart Co., 751 F.2d 69
2 (2nd Circuit 1984) (no written agreement where a draft
3 contract said it would be binding "when duly executed.").

4 Adjustrite Systems v. JAB Business Services, 145
5 F.3d 543 (2nd Circuit 1997) (where the parties signed a two-
6 page agreement regarding a sale of assets, which provided
7 for the execution of a "sales agreement contract", as well
8 as other agreements that never were executed, the two-page
9 agreement was not a binding agreement but was just an
10 unenforceable agreement to agree).

11 Missigman, M-I-S-S-I-G-M-A-N v. USI Northeast
12 Inc., 131 F.Supp. 2d 495 510 (SDNY 2001) (finding no
13 contract where an agreement was "subject to the execution of
14 an employment agreement").

15 Angelo Gordon & Company, L.P. v. Dycom Industries,
16 2006 US District Lexis 15784 (SDNY March 31, 2006) (where a
17 trade confirmation stated that it would be binding "upon
18 execution" by both buyer and seller, the Court concluded
19 that the parties did not intend to be bound without a signed
20 written agreement).

21 DCR Mtge. VI Sub 1, LLC v. People's United
22 Financial, Inc., 148 A.D. 2d 986 987 (2nd Department 2017)
23 (no contract or an agreement was "subject to negotiation of
24 the mutually agreed upon loan sale agreement").

25 Hawkins v. Medapproach Holdings, Inc., 2018 U.S.

1 District Lexis 43500 at Star 3-4 (SDNY March 15, 2018)
2 (finding no intent to be bound where a proposed agreement
3 stated that it was "subject to attorney review and
4 discussion").

5 Perhaps most remarkable of all in this particular
6 regard is the decision in the New York State Courts in 2017
7 in the lawsuit involving an affiliate of Seaport that I have
8 referred to earlier. The case name is Luxor Capital Group,
9 L.P. v. Seaport Group, LLC. The Trial Court decision is
10 reported at 2016 New York Misc. Lexis 1454 (April 15, 2016),
11 and the decision on appeal is reported at 148 A.D. 3d 590
12 (2017). The decision on appeal was issued after the
13 Stonehill decision.

14 In the Luxor case, Luxor argued that Seaport had
15 breached a contract to sell Twitter common stock. Seaport
16 argued that there had only been an unenforceable agreement
17 to agree and not an enforceable contract. The Trial Court
18 decision noted that, "Seaport intends that the parties did
19 not enter into an enforceable agreement because the
20 purported agreement was explicitly subject to mutually
21 satisfactory documentation. Seaport urges that the parties
22 did not intend those instant messages to be binding until
23 their agreement was reduced to writing and signed, which
24 never happened. Seaport maintains Luxor requested that the
25 trade be subject to documentation, and Luxor's internal

1 emails demonstrate that it knew and intended that the
2 subject to language meant there was an out.

3 The Trial Court agreed and held that instant
4 messages saying that a deal was "subject to mutually
5 satisfactory documentation" constituted a reservation of a
6 right not to be bound absent a written agreement. The Trial
7 Court accepted Seaport's argument that, "to ignore these
8 expressions of the parties' intent would violate the
9 fundamental principle that the court must interpret the
10 agreement to give every provision meaning." It, therefore,
11 granted summary judgment in favor of Seaport.

12 The Appellate Division affirmed, holding that the
13 "subject to" language had the effect that the lower court
14 had found. It confirmed that the Stonehill decision did not
15 require a different result, and that, "unlike in Stonehill,
16 the totality of the circumstances here does not reflect any
17 certainty as to the existence of an enforceable contract."

18 It certainly is true after Stonehill that a
19 statement that an agreement is subject to further
20 documentation and execution of a written contract does not
21 automatically indicate an intent not to be bound, at least
22 where there are other explicit statements in the parties'
23 dealings that plainly and unequivocally confirm an intent to
24 be bound.

25 But the language does have meaning, and it

1 frequently is understood and used to convey the notion that
2 a party does not intend to be bound at all unless and until
3 a written agreement is signed.

4 I find that that is what the parties understood
5 the language to mean in this particular case.

6 Whitebox urges me to find the contrary and places
7 strong reliance on Chief Judge McMahon's decision in Bear
8 Stearns Investments Products v. Hitachi Auto Products USA,
9 401 B.R. 598 (SDNY 2009).

10 I should first note that all of Judge McMahon's
11 discussions of the relevant case law and her findings about
12 the absence of a full agreement in that case are fully
13 consistent with what I have held and with what I have found
14 in this case.

15 The only difference in the outcomes is that in
16 Bear Stearns, Judge McMahon found that an enforceable Type
17 II contract had been reached. She explicitly declined to
18 reach such a conclusion based on contentions about industry
19 custom where there was no evidence that the seller was
20 familiar with those customs. However, she found that there
21 was other evidence, primarily in the form of an internal
22 communication that the seller had sent that showed, in her
23 mind, a clear intent by the seller to be bound by a
24 preliminary agreement and to negotiate the rest of the terms
25 in good faith.

1 Here, in contrast, I find that the evidence shows
2 the opposite, for all of the reasons that I have explained
3 in detail and that I need not repeat.

4 As the Court of Appeals noted in its decision in
5 RG Group, Inc. v. Horn & Hardart Co., 751 F.2d 69 74-75
6 (2nd Circuit 1984), "It is important to commerce that the
7 law make clear what force will be given to various
8 expressions of intent, or otherwise, parties could never be
9 assured that they were, in fact, channeling their
10 negotiations toward an oral contract or toward a written
11 one. Hard and fast requirements of former are out of place,
12 of course. But when a party gives forthright reasonable
13 signals that it means to be bound only by a written
14 agreements, courts should not frustrate that intent."

15 I find that Landstar gave such forthright
16 reasonable signals in this case; and, therefore, that no
17 binding contract of any kind, whether a fully formed
18 contract or a so-called Type II contract could have been
19 formed in the absence of a signed written agreement.
20 Whether this is stated as a reservation of the right not to
21 be bound, for purposes of the first factor in the Winston
22 decision, or as what the evidence shows as to the parties'
23 intent.

24 And as to the context of the negotiation, the
25 first and second factors listed at Cara, I find the evidence

1 clearly shows an intent not to be bound to any agreement at
2 all, including any preliminary agreement, unless and until a
3 full written agreement on all terms has been signed.

4 It is not really clear that I even need to
5 consider the other factors in light of this finding. See
6 (indiscernible), 414 Fed. Appendix 354 355 (2nd Circuit
7 2011), but I will do so for the sake of completeness.

8 The second factor to be considered under Winston
9 and the fourth factor listed under Cara is whether there has
10 been partial performance of the contract. This is relevant,
11 of course, because partial performance is good evidence the
12 parties believed they had an actual deal. The parties
13 concede that there was no partial performance in this case.

14 The third factor to be considered under Winston
15 and the third factor under Cara is, "whether all terms of
16 the alleged contract had been agreed upon" or whether there
17 were "open terms."

18 By the end of trial, both parties conceded that
19 there was never a full agreement on all terms. That itself
20 does not bar a finding that a Type II contract existed if
21 there was an agreement to be bound by some terms, coupled
22 with a binding agreement to negotiate in good faith as to
23 other terms. But there was no such binding partial
24 agreement or binding agreement to negotiate in this case.

25 The final factor to be considered is whether the

1 agreement at issue is the type of contract usually committed
2 to writing or, as stated in Cara, the customary form of the
3 transaction. I find based on the record that it is
4 customary for parties in this industry to execute written
5 documentation in connection with the trading of claims. The
6 witnesses at trial confirmed that this is the usual
7 practice, though Whitebox contended it was not necessarily a
8 legal requirement.

9 As I noted earlier, Whitebox argued that there are
10 customs in the claims trading field that they believe call
11 for a different result in this case. Whitebox argues that
12 it is important that traders be able to make deals based on
13 emails exchanges and important that parties be bound by
14 those deals before written documents are signed because,
15 otherwise, parties would be free to pull out of deals just
16 because prices have changed.

17 But if this is truly the case, the right answer is
18 that Seaport and other parties in this industry ought to be
19 clear and direct in setting forth their agreements in the
20 emails they exchange. If Seaport wishes to enter into
21 partial Type II contracts, it can and should say so
22 explicitly. If that is its intent, there is no reason why
23 it cannot say in its emails that we consider this to be a
24 binding legally -- or legally binding preliminary contract
25 with price already agreed upon and with the parties

1 obligated legally in good faith to negotiate other terms.

2 What seems to be happening instead is that the
3 participants in this industry use language that reassures
4 sellers that nothing is binding until the whole deal is
5 done, and that permits the people in the industry to take
6 different positions in different cases as to what the
7 language means and what the customs allegedly are, depending
8 upon the participants' self-interest in those individual
9 cases.

10 To see this disparity, one need only contrast the
11 positions taken by Whitebox here with the positions taken by
12 Seaport in the New York State Court. No court should
13 endorse such a practice.

14 Similarly, much of what Whitebox argues, in terms
15 of custom, is not so much a request that I find that there
16 was an actual preliminary agreement here; rather, it asks
17 me, due to the needs of the industry, to impose one upon
18 Landstar, even in the absence of proof that Landstar itself,
19 which is not a participant in the industry, actually
20 understood that it had entered into a preliminary agreement.
21 That is not the proper role of a court.

22 The role of a court is to determine what parties
23 have agreed to, and if they have made an agreement, to
24 enforce it. It is not the role of the court whether to
25 serve the interests of an industry or for other purposes, to

1 impose contracts on parties that the parties themselves have
2 not agreed to.

3 Courts have correctly urged caution in finding an
4 intent to form a preliminary or Type II contract. And I
5 find, based on the evidence, that it is quite clear that
6 there was no intent by either party to form such a contract
7 in this case.

8 There was a conceptual agreement as to a purchase
9 price, but there was never a binding agreement between the
10 parties. I, therefore, find in favor of Landstar. The
11 transfer notices should be canceled and withdrawn, and the
12 claims and noticing agent should recognize that Landstar
13 entities as the proper owners of the claims.

14 A separate order will be issued to this effect.
15 Thank you very much.

16 (Whereupon these proceedings were concluded at
17 5:38 PM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

Veritext Legal Solutions

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Date: July 25, 2018